NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

MILFAM II LP, Trust A-4,	)	
Appellants,	)	
vs.	)	NO. 4:05-cv-00030-DFH-WGH
AMERICAN COMMERCIAL LINES, LLC, ET AL, AMERICAN COMMERCIAL LINES, LLC,	)	
Appellees.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

MILFAM II LP and TRUST A-4, Appellants, v. AMERICAN COMMERCIAL LINES, LLC, et al., Appellees.	)	CASE NO. 4:05-cv-0030-DFH-WGH
IN RE AMERICAN COMMERCIAL LINES, LLC, et al., Debtors.	)	BANKRUPTCY COURT CASE NO. 03-90305-BHL-11

ENTRY ON APPEAL FROM BANKRUPTCY COURT

This action is an appeal from a decision of the United States Bankruptcy Court for the Southern District of Indiana approving a Chapter 11 reorganization plan for a group of debtors under the umbrella of American Commercial Lines, LLC. For reasons explained below, the court finds that the appeal should be dismissed under the doctrine formerly known as equitable mootness. Appellants did not seek a stay, and the reorganization plan has been substantially implemented. See *In re UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (dismissing appeal and "banishing" name of doctrine but not offering substitute).

Dismissal would be appropriate even if the appeal had some merit. The appeal's lack of merit makes the case for equitable dismissal of this appeal overwhelming.

Factual Background

American Commercial Barge Lines, Inc. and its affiliated entities (collectively, "ACBL") were in the business of building, operating, and maintaining barges used for bulk freight transport on rivers and coastal waterways in the United States. The barge business is cyclical. At the beginning of 2003, ACBL and its related entities were obligated on approximately $800 million in debt.

On January 31, 2003, ACBL and a number of related entities filed petitions for bankruptcy protection under Chapter 11 of the bankruptcy code. The debtors and the creditors' committee disagreed on how best to proceed. The bankruptcy court authorized an effort to sell the debtors' businesses. The effort was not successful. Over the summer of 2004, the debtors and creditors tried a new approach. They reached an agreement on a complex plan of reorganization that would leave holders of ACBL equity and some subordinated debt "out of the money," but that would provide for new infusions of capital that would enable almost all of the debtors' businesses to stay in operation, continuing to serve customers and employing several thousand people.

On December 30, 2004, Chief Bankruptcy Judge Lorch gave final confirmation to the reorganization plan. In doing so, he overruled objections by appellants Milfam Family Trust II and other Miller family related entities (here, "the Miller entities").

The Miller entities did not come onto the scene until after the bankruptcy proceedings had begun. They bought what is politely known as "distressed debt." The notes they bought are known in this case as the PIK (for "payment-in-kind") notes, which were subordinated to all other forms of ACBL debt. The Miller entities bought some of these PIK notes in October 2003 and bought more in June and August 2004, for a total purchase of notes with face values of $22 million. The Miller entities did not participate in the negotiations leading to the reorganization plan. Instead, they appeared in the bankruptcy court to oppose the plan because it appeared that the holders of the PIK notes would be left out of the money, leaving the Miller entities' speculative investments nearly worthless. (Actually, the reorganization plan offered holders of the PIK notes the right to purchase some equity shares in the new entity for $12.00 per share, which is well below market value, but the Miller entities are seeking much more in this appeal.)

In deciding whether to approve the reorganization plan or to sustain the Miller entities' objections, the principal issue before the bankruptcy court was to decide the "enterprise value" of the debtors. The bankruptcy court found that the enterprise value was $500 million. That value was higher than any number that had appeared recoverable by selling the businesses. It was still too low to provide full payment in cash to the holders of senior debt and too low to provide any payment in cash to holders of the PIK notes. The $500 million figure was about $50 million higher than the estimate by two expert witnesses retained by the debtors and the creditors' committee. The figure was well below the $650 million or so proposed by Tom Thompson, a witness retained by the Miller entities.

The arrangements between the Miller entities, Thompson, and his employer Imperial Capital, LLC, and the trading of senior notes just before and after the bankruptcy court's decision deserve detailed attention. First, the Miller entities retained Thompson and his business, Imperial Capital, LLC, on a contingent fee basis. Thompson and Imperial Capital would be paid 10 percent of the "Total Consideration" the Miller entities would receive above that provided by the proposed reorganization plan. If the Miller entities hit a home run, with recovery above 6 percent of the fully diluted equity, Thompson and Imperial Capital would receive 25 percent of that additional amount. Thus, as a practical matter, Thompson and Imperial Capital would receive a fee for his testimony only if he could convince the bankruptcy court to accept an enterprise value substantially higher than $500 million. The higher the value found by the court, the greater the fee. If the bankruptcy court decided that the PIK notes finished out of the money, there would be no fee.

This highly unusual contingent fee for an expert witness raises obvious questions of credibility. The Seventh Circuit has not held such arrangements illegal *per se* but has instead left the trier of fact to consider the credibility issues.

See *Tagatz v. Marquette University*, 861 F.2d 1040, 1042 (7th Cir. 1988) ("It is unethical for a lawyer to employ an expert witness on a contingent-fee basis, * * * but it does not follow that evidence obtained in violation of the rule is inadmissible."), citing 3 Weinstein's Evidence ¶ 706[03] at pp. 706-23 to 706-24 (1987); *In re Joy Recovery Technology Corp.*, 286 B.R. 54, 69 (Bankr. N.D. Ill. 2002). Among Indiana courts, the Indiana Tax Court has noted the "prevailing general rule that it is inappropriate to pay an expert witness a contingent fee," but has thus far held that the testimony is admissible before the Tax Court in its bench trials and that the contingent fee is a matter going to the weight of the evidence. *Wirth v. State Bd. of Tax Comm'rs*, 613 N.E.2d 874, 876-77 (Ind. Tax 1993); see also *Accrued Financial Services, Inc. v. Prime Retail, Inc.*, 298 F.3d 291, 300-01 (4th Cir. 2002) (contingent fee witnesses are forbidden by common law); *Person v. Ass'n of Bar of City of New York*, 554 F.2d 534 (2d Cir. 1977) (holding that former Disciplinary Rule 7-109, which prohibited contingent fees for expert witnesses, did not violate federal Constitution).[1] Thompson denied that this arrangement had any effect on the content of his testimony. Nonetheless, the

[1] Rule 3.4(b) of the Indiana Rules of Professional Conduct provides that a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." The official comment to the rule notes: "The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee." A federal statute, 18 U.S.C. § 201(b)(3) & (4), makes it a federal crime to "corruptly" promise or solicit something of value in return for a federal witness's testimony. The statutory exception for expert witnesses refers to payment for the witness's time, and does not appear to cover contingent fees. 18 U.S.C. § 201(d).

bankruptcy court was entitled to discredit anything he said on the basis of this unusual arrangement.[2]

Second, Thompson based his opinions heavily upon the theory that, after the parties had agreed on the reorganization plan, trading in the secondary market for senior debt of ACBL showed that traders and arbitragers expected the shares of the reorganized company to be so valuable that holders of the senior debt would receive shares worth more than 100 cents on the dollar of their notes. In theory, of course, it makes sense to rely on actual market transactions to establish value rather than on analyses that are intended to estimate what the terms of actual market transactions would be if there were any. See *In re Prince*, 85 F.3d 314, 319-20 (7th Cir. 1996). The problem in this case is that the market for the senior debt was thin, and the company promoting purchases of the senior debt and making the market was none other than – Imperial Capital, the same company that stood to make a huge fee if Thompson could convince the bankruptcy court that the enterprise value for the debtors should be based upon those same market transactions. This degree of circularity is added to the already somewhat circular dimension of Thompson's opinion, since the trading prices for the senior debt were agreed upon after the reorganization plan had been agreed upon between the debtors and the creditors' committee.

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[2]The court will send a copy of this decision to the Indiana Supreme Court Disciplinary Commission for its possible consideration of the issue of contingent fees for expert witnesses.

Equitable Considerations

In *UNR Industries*, the Seventh Circuit explained that a case is not technically moot if a court could still grant relief that would benefit the party seeking it, even if it would not be prudent to grant the relief. 20 F.3d at 769; accord, *In re Envirodyne Industries, Inc.*, 29 F.3d 301, 303-04 (7th Cir. 1994) (describing "now nameless doctrine" in Chapter 11 bankruptcy cases as application of principle that a court considering equitable relief must consider possible effects on innocent third parties). Other courts apply the same principle and continue to use the "equitable mootness" label. *E.g.*, *In re U.S. Airways Group, Inc.*, 369 F.3d 806, 809 (4th Cir. 2004); *Nordhoff Investments, Inc. v. Zenith Electronics Corp.*, 258 F.3d 180, 184 (3d Cir. 2001); *In re Manges*, 29 F.3d 1034, 1038-39 (5th Cir. 1994); *In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993).

In applying this doctrine that is now nameless within the Seventh Circuit, the court must consider whether the reorganization plan has been substantially consummated; whether a stay has been obtained; whether the relief requested would affect parties not before the court; whether the relief requested would affect success of the plan; and the public policy of affording finality to bankruptcy judgments. See *Nordhoff Investments*, 258 F.3d at 185; *In re Genesis Health Ventures, Inc.*, 280 B.R. 339, 344 (D. Del. 2002) (dismissing bankruptcy appeal under circumstances strikingly similar to this case, where lower valuation finding left holders of junior securities "out of the money," no court had ordered a stay, and the plan had been substantially implemented).

The relief the Miller entities seek in this case is to have the reorganized debtors issue additional equity shares in the reorganized debtor to holders of the old PIK notes. (Other forms of suggested relief would be even more disruptive and need not be discussed separately.) Issuing such shares to holders of the PIK notes would give them a larger share of the new company vis-a-vis the holders of the senior debt.

Technically, a court could order such issuance of new shares, which would provide some relief to the Miller entities. That possibility saves the appeal from jurisdictional mootness. *E.g.*, *UNR Industries*, 20 F.3d at 768. Consistent with *UNR Industries*, and based on the factors set forth in *Nordhoff Investments* and *Genesis Health Ventures*, however, it would not be equitable or prudent to grant such relief.

First, the reorganization plan has been substantially consummated, and it had been substantially consummated when the Miller entities first sought expedited consideration of the appeal. (They have never sought a stay from this court, the Seventh Circuit, or the Supreme Court.) For purposes of the bankruptcy law, substantial consummation means the transfer of all or substantially all of the property the plan proposes to transfer; the reorganized entity's assumption of the business and/or management of the property addressed by the plan; and the start of distribution under the plan. 11 U.S.C. § 1101(2).

In this case that stage had been reached within a few days after the January 11, 2005 effective date of the plan. The debtors' motion to dismiss identifies many transactions that occurred within days to implement the plan. The transactions that occurred before the Miller entities filed their brief in this appeal include the creation of several new corporations, the discharge of the debtors' debts, the extinguishment of equity in the old entities, the issuance and distribution of new equity shares in the reorganized debtors, the issuance of several layers of new credit to the reorganized debtors (which were used in part to pay creditors of the old debtors), the distribution of cash to holders of many claims against the old debtors, and the appointment of new directors and new senior management. Trading in the new shares began as well.

Second, the Miller entities did not diligently and promptly seek a stay. On January 10, 2005, the last day of the ten-day automatic stay period, the Miller entities asked the bankruptcy court to reconsider its Confirmation Order. The bankruptcy court denied that motion on January 12, 2005. The Miller entities did not seek a stay from the bankruptcy court or from this court at that time. They filed their notice of appeal on January 19, 2005. Then, on February 17, 2005, the Miller entities asked the bankruptcy court for a partial stay of implementation under Bankruptcy Rule 8005. The bankruptcy court quickly heard the matter and denied the request on March 3, 2005. After than denial, the Miller entities sought no stay from this court. A stay not sought, and a stay sought and denied, lead equally to implementation of the plan. *UNR Industries*, 20 F.3d at 770. On March 10, 2005, the Miller entities filed their brief on the merits of this appeal, two months after implementation of the plan. By late March 2005, the reorganization plan had been almost fully implemented.

On August 9, 2005, the Miller entities filed not a motion for a stay but an "emergency motion for expedited consideration of appeal." The motion asserted that the reorganized debtors planned to conduct an initial public offering of stock. The court denied the motion, noting that the Miller entities had chosen not to seek a stay of the plan of reorganization. The Bankruptcy Rules gave the Miller entities the benefit of an automatic ten-day stay after final approval of the reorganization plan. Bankr. Rule 3002(e). That period was designed to give them time to seek a longer stay if they believed they would suffer irreparable harm if the plan were implemented. See *Nordhoff Investments*, 258 F.3d at 186-87; *In re Public Service Co. of New Hampshire*, 963 F.2d 469, 473 (1st Cir. 1992) (if no stay is obtained, interested parties are free to implement plan, which may moot the matter in dispute on appeal).

Third, ordering issuance of additional shares for the benefit of PIK note holders would adversely affect the holders (including innocent third parties) of the existing equity shares in the reorganized company. The new shares would dilute and thus reduce the value of the existing equity shares. Now, one could argue that the existence of their appeal was a matter of public record, so that buyers of those shares on the open market could be assumed to have taken the risk that a court might step in and dilute their shares. As a theoretical matter, that is true, but purchasers of those shares would also have a right to rely on the absence of any stay of the plan. See *Genesis Health Ventures*, 280 B.R. at 344 (dismissing appeal seeking dilution of shares that had been trading on public market where appellant had failed to seek a timely stay; mere filing of notice of appeal was not sufficient to undermine reliance interests). More generally, if courts order post-implementation relief in the absence of a timely stay, the risk of such actions will reduce the value of the benefits of the plan to some parties. Those parties will be less likely to agree to plans and to take the risk of making new investments in an entity emerging from bankruptcy. See *UNR Industries*, 20 F.3d at 770 ("People pay less for assets that may be snatched back or otherwise affected by subsequent events. Self-protection through the adjustment of prices may affect the viability of the reorganization . . . ."). Without adopting the debtors' label of the prospect of such relief as a "fraud on the market," the court is satisfied that it would be inequitable and unfair to allow the relief the Miller entities seek to the detriment of innocent purchasers of the new shares.

Fourth, the relief requested could affect the success of the plan. At this point, the plan is well under way, and it might be too late to derail the plan (or to drive it off course, to pick the more apt transportation metaphor). To the extent that a late court order might upset lenders' and investors' expectations and could affect their willingness to continue to invest in the reorganized debtor, this factor at least does not weigh against dismissal.

Fifth and finally, the relief would upset the public policy interest in the finality of bankruptcy judgments, though this factor seems to restate the purpose of the doctrine and not to add too much weight to those already discussed.

In sum, then, the factors identified in *Nordhoff Investments* and *Genesis Health Ventures* weigh in favor of dismissal on equitable considerations. Where the issue is an equitable one, such as whether to dismiss a bankruptcy appeal, equitable considerations also do not prohibit a court from looking at the merits of the appeal. *E.g.*, *In re Envirodyne Industries*, 29 F.3d 301, 304 (7th Cir. 1994) (choosing to decide merits of appeal of Chapter 11 reorganization plan, which were clear, rather than remand for more findings on equitable issues concerning effects of possible relief on innocent parties). Similarly, courts must take the strength of the merits into account in deciding whether to grant temporary restraining orders, preliminary injunctions, and stays on appeal. *E.g.*, *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992) (preliminary injunction); *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006) (denying stay pending appeal). Here, the issues raised by the Miller entities have some superficial luster, but it fades quickly upon further review.

First, the challenge to the bankruptcy court's finding on enterprise value appeals to the wisdom of capital markets in valuing the enterprise. The challenge is also built upon Thompson's testimony, though. The bankruptcy court found that his testimony was not credible, based not only on the questionable contingent fee but also an assessment of the merits. The challenge is also based on hindsight after the plan seems to be fairly successful during a relatively good period for the barge industry. The bankruptcy court had to make a decision without the benefit of hindsight, and at a time when the most relevant market information was that the attempt to sell the business had not attracted any more than $450 million. See Bankruptcy Ct. Findings of Fact at 26-28.[3]

Moreover, though market trading data can be highly probative in many situations, at the time the bankruptcy court had to make its decision about enterprise value, the evidence of the trading values of the senior securities was limited to just two days of trading in a market structured by Imperial Capital itself, the company that stood to benefit if Thompson could convince the bankruptcy court. *Id.* at 28. See *Beerly v. Dep't of Treasury*, 768 F.2d 942, 946 (7th Cir. 1985) (past stock sales may not be a reliable guide to current value when stock is traded infrequently).

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[3]With their reply brief on the merits, the Miller entities submitted a new affidavit from Thompson with evidence of securities trading that occurred after the effective date of the plan. The court hereby grants the debtors' motion to strike that affidavit (Docket No. 20). The issues on the merits of the appeal would have to be decided based on the record before the bankruptcy court; the appeal does not provide an opportunity to submit new evidence or to conduct a new trial.

The Miller entities' challenge to the enterprise value finding could not prevail without a reviewing court finding that the bankruptcy court clearly erred in choosing to credit two expert witnesses who testified differently than the witness whose paycheck depended on his ability to persuade the court. For the Miller entities to prevail and to finish "in the money" at all, they would need to show that the bankruptcy court erred by at least $76 million (and probably $126 million, depending on whether the senior debt holders would be deemed entitled to post-petition interest). It also did not escape the bankruptcy court's notice that the other expert witnesses were far more experienced in and familiar with maritime businesses in general and the "brown water" barge business in particular than Thompson was, or that Thompson had ignored the so-called "cliff" issue posed by the debtors' aging fleet of barges, which could not sensibly be ignored. Findings of Fact at 27-28, 25.

The bankruptcy court's consideration of the enterprise value issue was careful, detailed, and thoughtful. *Id.* at 21-30. The challenge to the bankruptcy court's finding of enterprise value would have little prospect of success if the court were to reach the merits.

Second, the Miller entities argue that they are entitled to a determination of whether the senior debt holders had been paid in full as of the date those senior debt holders actually received their new shares in the reorganized debtors. The indenture for the PIK notes makes clear that they are in fact subordinate to more senior debt. It states that the senior debt holders "will first be entitled to receive payment in full in cash and all letters of credit issued under the New Credit Agreement will either have been terminated or cash collateralized in accordance with terms thereof before the Holders [of the PIK notes] are entitled to receive any payment (other than in the form of Junior Securities) on account of any Obligation in respect of [the PIK notes]." Indenture, Article XI.

The Miller entities argue that the reorganization plan conflicts with Article XI of the PIK note Indenture. Their theory is that after the holders of senior debt were paid in full, the PIK note holders were entitled to step forward to receive any further payments that might have been made on behalf of the senior debt holders. The Miller entities rely on language: "Senior Debt shall not be deemed to have been paid in full unless the holders thereof shall have received cash, securities, or other property equal to the amount of such Senior Debt then outstanding." Indenture, Article XI. They argue that a determination of whether senior debt has been paid in full should be based on the value of property the holders received on the date they received it, and the Miller entities rely on additional trading data from after the plan confirmation to support their argument that the senior debt holders have received a windfall.

The bankruptcy court addressed the issue at pages 30-33 of its findings of fact and explained how the Indenture and reorganization plan in this case fit in with the Seventh Circuit's decision on similar but arguably ambiguous language in *Envirodyne Industries*, 29 F.3d at 305-06. This court has nothing to add to Judge Lorch's discussion of the issue, which shows that the Miller entities have little prospect of success on this point, as well.

Third, the Miller entities challenge some third-party releases that were part of the reorganization plan, in Section 6.19. The releases applied only to claims arising out of or in connection with the Chapter 11 cases before the effective date of the reorganization plan. The releases were provided under the plan to large creditors and other parties in interest, plus their officers, directors, attorneys, and other professionals. The bankruptcy court upheld the releases because the creditors and others had accepted impairment of their contractual rights to facilitate the reorganization and continued operation of the debtors, and because the officers, directors, and others had made substantial investments of time and energy to put together a fair and viable plan. Findings of Fact at 37. The bankruptcy court found that the releases should be approved on the authority of *In re Specialty Equipment Companies, Inc.*, 3 F.3d 1043, 1047 (7th Cir. 1993), and *In re Keck, Mahin & Cate*, 241 B.R. 583, 592-93 (Bankr. N.D. Ill. 1999) (following *Specialty Equipment*). The releases also appear to be consistent with the Seventh Circuit's decision applying the "*Barton* doctrine" so that a bankruptcy court may oversee litigation arising from the bankruptcy litigation itself. See *In re Linton*, 136 F.3d 544, 545 (7th Cir. 1998). The releases also are an essential part of the reorganization plan; the released parties have gone forward with implementation of the plan in reliance on the releases. If the court were to order that the releases be deemed void and unenforceable, those parties would suffer from an after-the-fact change in the terms of the deal they joined. They would face further litigation of issues they reasonably thought were closed. That would not be equitable.

Conclusion

For the reasons stated above, the debtors' motion to dismiss the appeal (Docket No. 8) is granted. Final judgment to that effect shall be entered. The Miller entities' motion for oral argument (Docket No. 29) is denied.

So ordered.

Date: March 30, 2006

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DAVID F. HAMILTON, JUDGE
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